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IN THE

Supreme Court of the United States

October Term, 1963

No. 623

FRED S. CALHOUN, *et al.*,

Petitioners,

—v.—

A. C. LATIMER, *et al.*,

Respondents.

BRIEF FOR PETITIONERS

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INDEX

PAGE

Opinions Below 1

Jurisdiction 2

Constitutional Provision Involved 2

Question Presented 2

Statement 2

ARGUMENT

The Plan Erroneously Approved Below Does Not Conform to the Mandate of This Court; the Plan Desegregates Too Little, Too Late 7

CONCLUSION 18

TABLE OF CASES

Augustus v. Board of Public Instruction, 306 F. 2d 862 (5th Cir. 1962) 5, 6, 9

Board of Public Instruction of Duval County v. Braxton, 5th Cir., No. 20294, January 10, 1964 16

Brown v. Board of Education of Topeka, 347 U. S. 483 ..... 2, 5, 7, 9

Brown v. Board of Education of Topeka, 349 U. S. 294 ..... 2, 5, 9

Bush v. Orleans Parish School Board, 308 F. 2d 491 (5th Cir. 1962) 5, 6, 10, 15

Cooper v. Aaron, 358 U. S. 1 ..... 5, 9

Evans v. Ennis, 281 F. 2d 385 (3d Cir. 1960) 15

PAGE

Farmer v. Greene County Board of Education, 4th Cir., No. 9125 11

Goss v. Board of Education of the City of Knoxville, 373 U. S. 683 ..... 5, 14
Goss v. Board of Education of the City of Knoxville, 301 F. 2d 164 (6th Cir. 1962), reversed on other grounds, 373 U. S. 683 15
Green v. School Board of the City of Roanoke, 304 F. 2d 118 (4th Cir. 1962) 11

Jackson v. School Board of the City of Lynchburg, 321 F. 2d 230 (4th Cir. 1963) 15
Jeffers v. Whitley, 309 F. 2d 621 (4th Cir. 1962) 11
Jones v. School Board of the City of Alexandria, 278 F. 2d 72 (4th Cir. 1960) 5, 11

Northcross v. Board of Education of the City of Memphis, 302 F. 2d 818 (6th Cir. 1962) 5, 11, 12, 13

Shuttlesworth v. Birmingham Board of Education, 358 U. S. 101, affirming 162 F. Supp. 372 (N. D. Ala. 1958) 8

Watson v. City of Memphis, 373 U. S. 526 ..... 5, 13

FEDERAL STATUTE

United States Code, Title 28, §1254(1) 2

OTHER AUTHORITIES

Bickel, *The Decade of School Desegregation*, 64 Columbia Law Review 193 (1964) 17

Southern Education Reporting Service. *Statistical Summary of School Segregation—Desegregation in the Southern and Border States* (1963-1964) 7

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Opinions Below

The District Court's opinion denying further relief and from which an appeal was taken to the court below is reported at 217 F. Supp. 614 and printed in the record at page 156.

Prior Findings of Fact, Conclusions of Law, Orders and Judgments of the United States District Court for the Northern District of Georgia, Atlanta Division (R. 9, 18, 38, 43, 47, 48, 160, 165) are reported at 188 F. Supp. 401 and 188 F. Supp. 412.

The opinions of the United States Court of Appeals for the Fifth Circuit, modifying and affirming the decision of the District Court and denying petitioners' petition for rehearing *en banc* are printed in the record at 229, 258 and reported at 321 F. 2d 302.

Jurisdiction

The judgment of the Court of Appeals was entered on June 17, 1963 (R. 254). Application for rehearing *en banc* was denied on August 16, 1963 (R. 259). The petition for writ of certiorari was filed November 14, 1963 and granted January 13, 1964. The jurisdiction of this Court is invoked pursuant to 28 U. S. C. §1254(1).

Constitutional Provision Involved

This case involves Section 1 of the Fourteenth Amendment to the Constitution of the United States.

Question Presented

Respondent school authorities operate a biracial system which, under court order, now allows children to transfer to schools for the other race upon satisfying seventeen pupil assignment criteria, leaving the dual system otherwise intact. This limited opportunity to transfer has been given on a twelve year descending grade-a-year basis and is now enjoyed by children in the 12th, 11th, 10th and 9th grades. In 1972 children will still have only this limited right. Does not *Brown* v. *Board of Education* impose upon respondents the affirmative duty to (a) reorganize the schools into a unitary non-racial system, and (b) to do so much more quickly than in twelve years?

Statement

For approximately four years subsequent to this Court's decision in *Brown* v. *Board of Education of Topeka*, 347 U. S. 483, the public schools of Atlanta remained segregated,

while Negro parents vainly petitioned local school authorities for redress (R. 4, 163).

Then, on January 11, 1958, petitioners, parents of Negro school children, brought suit in the U. S. District Court for the Northern District of Georgia, seeking desegregation of Atlanta's public school system. The Court found that a biracial school system existed; therefore, the Court ordered respondents to submit a plan for desegregation by December 1, 1959, which they did. The plan was approved by the District Court on January 20, 1960. 188 F. Supp. 401, 412.

The plan called for the imposition of a racial transfer procedure upon the existing biracial school structure (R. 61-63). Individual transfer applications were to be judged by the Board on the basis of 17 pupil assignment criteria (R. 33-34). The plan was to commence in the 12th and 11th grades in September, 1961 and was to proceed on a grade-a-year basis, in descending order, thereafter (R. 47). All those students in grades below those in which the plan operated were to remain segregated.

Between May 1st and 15th, 1961, pursuant to the plan, 129 Negro students in grades 11 and 12 returned application forms for transfer to white high schools (R. 65). Of these, school authorities admitted 10 to four formerly all-white high schools (R. 68).

The pupil assignment criteria were applied only to those applicants, all Negroes, seeking transfer during the May 1st-15th period to schools attended by pupils of the opposite race. All other applications for transfer, whites to white schools and Negroes to Negro schools, were considered "informal" transfers and were made throughout the school year (R. 94-96).

On April 30, 1962, after the plan's first year of operation petitioners moved the district court for further relief (R.

53). They claimed that the plan, which had been approved over their numerous objections, had not resulted in desegregation (R. 56-57). They prayed for not only a new plan to speed up desegregation, but for one providing prompt reassignment and initial assignment of all students on some reasonable non-racial basis, e.g., the drawing of a single set of attendance area lines for all schools without regard to race or color to replace the dual scheme of school attendance area lines for Negro and white schools. Petitioners further claimed that the *Brown* case contemplated the reassignment of teachers on a non-racial basis and the elimination of all other racial distinctions in the operation of the school system (R. 56). In short, the petitioners sought integration of the dual school system into a unitary non-racial system, and with greater speed.

In September, 1962, 44 out of 266 Negro applicants were admitted to grades 10, 11 and 12 (R. 94). On November 15, 1962, petitioners' motion for further relief was denied (R. 156). 217 F. Supp. 614. The District Court (Hooper, District Judge) held (R. 157):

> There is no disputing that discrimination had existed prior to the Order of this Court of January 20, 1960, and that the Order of that date was designed to eliminate the discrimination over a period of years. Even plaintiffs' counsel upon the original trial disclaimed any purpose of seeking to have "wholesale integration." The only question then involved was the plan by which discrimination could be eliminated; a Plan was carefully prepared and adopted and no appeal taken. The Plan is eliminating segregation, but until it has completed its course there will of course still be areas (in the lower grades) where segregation exists. The Court is therefore at a loss to see how anything could be accomplished at this time by "an order enjoining

defendants from continuing to maintain and operate a segregated biracial school system", for the Court has already taken care of that in its decree of January 20, 1960.

Petitioners appealed to the Court of Appeals for the Fifth Circuit which (2-1),[1] on June 17, 1963, affirmed.

The Court, *per* Griffin B. Bell, Circuit Judge, recognized that the "bare bones" (R. 239) of the case was petitioners' prayer for desegregation through the drawing of school zone lines for each school on a non-racial basis and the assignment of all children living in the zone to the school without regard to race or color. Judge Bell denied petitioners' prayer, saying (R. 240), "the Atlanta plan of abolishment is one of gradualism by permitting transfers from present assignments." Judge Bell found no inconsistency between his decision and the decisions of this Court in *Brown* v. *Board of Education of Topeka*, 347 U. S. 483; *Brown* v. *Board of Education of Topeka*, 349 U. S. 294; *Cooper* v. *Aaron*, 358 U. S. 1; *Watson* v. *City of Memphis*, 373 U. S. 526; *Goss* v. *Board of Education of the City of Knoxville*, 373 U. S. 683; or the decisions of his own circuit, *Bush* v. *Orleans Parish School Board*, 308 F. 2d 491 (5th Cir. 1962); *Augustus* v. *Board of Public Instruction*, 306 F. 2d 862 (5th Cir. 1962); or the decisions of the Fourth Circuit, *Jones* v. *School Board of the City of Alexandria*, 278 F. 2d 72 (4th Cir. 1960); or the decisions of the Sixth Circuit, *Northcross* v. *Board of Education of the City of Memphis*, 302 F. 2d 818 (6th Cir. 1962). Judge Bell concluded (R. 242-243) that "the dual system will be entirely eliminated when the plan reaches the first grade. . . . So considered, we hold that there is insufficient evidence on which to base a determination that the start made in the

[1] The Court consisted of Judges Bell and Rives and David T. Lewis of the 10th Circuit, sitting by designation.

Atlanta schools is not reasonable, or that the plan is not proceeding toward the goal at deliberate speed."

Circuit Judge Richard T. Rives, in his dissent, found an inconsistency between the majority opinion and the prior applicable decisions of this Court. He also demonstrated that the opinion of the court was "a backward step" (R. 246) for the Fifth Circuit, which had previously required New Orleans, Louisiana and Pensacola, Florida to do far more toward insuring full compliance with this Court's school desegregation decisions, *Bush* v. *Orleans Parish School Board, supra, Augustus* v. *Board of Public Instruction, supra.* He concluded that until a start was made in abolishing the dual system of schools, whereby all white children went initially to white schools and all Negro children initially to Negro schools, no plan of selective transfer from formerly Negro to formerly white schools would fully satisfy the requirements of the *Brown* decision. Moreover, Judge Rives concluded that the Atlanta Plan does not now meet the requirements of deliberate speed. In this regard he declared (R. 253):

> Enjoined as we are to give fresh consideration to the element of timing in these school cases by the Supreme Court's latest pronouncement on the subject in [*Watson* v. *City of Memphis*, 373 U. S. 526] and, following the *Watson* decision, in *Josephine Goss et al.* v. *Board of Education, City of Knoxville, Tenn., et al.*, [373 U. S. 683], I cannot concur in a decision of this Court that takes a backward rather than a current, much less forward, step.

Rehearing was denied (2-1) on August 16, 1963 (R. 258-259).

Petitioners filed a petition for writ of certiorari on November 14, 1963, which was granted on January 13, 1964 (R. 260).

ARGUMENT

The Plan Erroneously Approved Below Does Not Conform to the Mandate of This Court; the Plan Desegregates Too Little, Too Late.

1. *The Transfer Plan Is Not an Effective Vehicle for Desegregation Because It Preserves the Biracial School Structure.*

The end result of Atlanta's plan has been that in Atlanta's public schools, a decade after the first *Brown* decision, 145 out of a total of 56,000 Negro students have been permitted to attend school with 58,000 white students.[2] In short, tokenism has been now superimposed upon so called separate but equal.[3] Petitioners submit that tokenism does not satisfy the Fourteenth Amendment mandate of equal protection of the laws.

Prior to September, 1961, Atlanta had a dual school system (R. 157). There was one system of schools for white pupils and a separate system of schools for Negro pupils. In September, 1961, a plan purporting to cure this constitutional infirmity was instituted. The adequacy of this plan must now be examined by this Court in the light of this Court's decisions.

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[2] Southern Education Reporting Service, *Statistical Summary of School Segregation-Desegregation in the Southern and Border States* (1963-1964), p. 17.

[3] Separate and *un*equal would be a more accurate characterization, for the school facilities for Negroes are in fact unequal to those for whites. Negroes constitute 49% of the school population, but they have been allotted only 33% of the school buildings and 40% of the teachers and principals; as a result, they suffer serious overcrowding in certain schools and have higher pupil-teacher ratios (R. 101).

Petitioners start with the incontrovertible proposition that segregation in Atlanta's schools exists unimpaired except as modified by the racial transfer plan.[4]

The plan provides for transfers on an individual basis for those students who satisfy 17 pupil placement criteria (R. 33-34).[5] Respondents judge the individual applications of Negroes, reject most,[6] and permit a nominal number to transfer. In practice, the structure of segregation remains unaltered—with a new facade.

In theory, as well, the plan is devoted to the promotion of token desegregation. The theory is to place the burden of leveling the structure on each individual school child. The child must procure a transfer application, prepare and submit it. If rejected for any of a number of vague reasons, the child must protest to the Board and then apply to the court for relief (R. 233). In court, the child must show a discriminatory application of the plan. It is painfully apparent that the plan calls for a war of attrition, in which only the hardiest will be able to bear the burden of a contest with state power. Moreover, the theory not only depends upon enmeshing each child in an administrative net, but depends as well upon clothing respondents—admitted wrongdoers—with practically unreviewable discretion over the quality and extent of their own reformation. The theory of the plan is to allow respondents to place a high price tag on the exercise of the constitutional

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[4] R. 61-63; Majority opinion, Footnote 4 (R. 240); dissenting opinion, Footnotes 4, 5 (R. 250-251).

[5] The 17 criteria are identical with those of the Alabama Pupil Assignment Law upheld as constitutional on its face in *Shuttlesworth* v. *Birmingham Board of Education*, 358 U. S. 101, affirming 162 F. Supp. 372 (N. D. Ala. 1958). Here, of course, the case involves the *application* of such a plan, not its surface plausibility.

[6] 119 out of 129 applicants were rejected in 1961 (R. 68); 222 out of 266 applicants were rejected in 1962 (R. 94).

right to attend desegregated public school facilities; the theory is to recognize a paper, not a present, right. The theory works and the result is, not unexpectedly, a system of token desegregation.

This Court did not hold in *Brown* v. *Board of Education* that the vice of total segregation could be cured by the device of token desegregation. This Court decreed the abolition of the biracial school system. That system retains its pristine strength today in Atlanta's grades 1-8; in grades 9-12, the essential structure of the biracial school system perdures.

This Court's decisions interdict the tokenism countenanced by the Atlanta plan. *Brown II* is perfectly explicit in its command that a prompt and reasonable start be made "to achieve a system of determining admission to the public schools on a nonracial basis" (349 U. S. at 300-301). What *Brown* requires is elimination, not modified retention, of the biracial school structure. In this context, what was said in *Cooper* v. *Aaron*, 358 U. S. 1, 17, is significant:

> In short, the constitutional rights of children not to be discriminated against in school admission on grounds of race or color declared by this Court in the *Brown* case can neither be nullified openly and directly by state legislators or state executive or judicial officers or nullified indirectly by them through an evasive scheme for segregation whether attempted "ingeniously or ingenuously." *Smith* v. *Texas*, 311 U. S. 128, 132, 85 L. Ed. 84, 87, 61 S. Ct. 164.

The decision below also conflicts sharply with decisions in the Fifth Circuit and in the Fourth and Sixth Circuits.

Judge Rives, in dissent below, correctly noted that the instant decision is an unwarranted retreat from the position taken in *Augustus* v. *Board of Public Instruction*, 306

F. 2d 862 (5th Cir. 1962) and *Bush* v. *Orleans Parish School Board*, 308 F. 2d 491 (5th Cir. 1962).

Both decisions unquestionably stand for the proposition that it is the dual school system itself which must be abolished and that the window dressing of a transfer plan is not a permissible substitute for the outright abolition of the system.

In *Bush*, as here, the Court of Appeals was presented with a pupil placement system which purported to be a vehicle for school desegregation. In *Bush*, the court rightly exposed the system as a sham. The Court said:

> This Court, like both Judge Wright[7] and Judge Ellis,[8] condemns the Pupil Placement Act, when, with a fanfare of trumpets, it is hailed as the instrument for carrying out a desegregation plan, while all the time the entire public knows that in fact it is being used to maintain segregation by allowing a little token desegregation. . . . The Act is not an adequate transitionary substitute in keeping with the gradualism implicit in the "deliberate speed" concept. It is not a plan for desegregation at all. 308 F. 2d at 499-500.

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[7] The Court set forth and approved Judge Wright's statement:

> To assign children to a segregated school system and then require them to pass muster under a pupil placement law is discrimination in its rawest form. 308 F. 2d at 498.

[8] The Court set forth and approved Judge Ellis' statement:

> . . . It goes without saying that although "[the] school placement law furnishes the legal machinery for an orderly administration of the public schools in a constitutional manner," . . . "[the] obligation to disestablish imposed segregation is not met by applying placement assignment standards, educational theories or other criteria so as to produce the result of leaving the previous racial situation existing as it was before" . . . It does no good to say that the pupil placement law is applied solely to transferees without regard to race when the procedure is so devised that the transferees are always Negroes. 308 F. 2d at 498.

Augustus is in accord. There it was said: "There cannot be full compliance with the Supreme Court's requirements to desegregate until all dual school districts based on race are eliminated" (306 F. 2d at 869).

Pupil placement plans superimposed upon biracial school structures have been similarly discarded in the Fourth[9] and Sixth[10] Circuits.

In *Northcross*, as here, the pupil assignment system continued to assign Negroes to Negro schools and whites to white schools, except as modified by the transfer plan. The

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[9] *Jones* v. *School Board of the City of Alexandria*, 278 F. 2d 72, 76 (4th Cir. 1960); *Green* v. *School Board of the City of Roanoke*, 304 F. 2d 118 (4th Cir. 1962).

It is possible that pupil placement plans or laws as a vehicle for school desegregation have some vestigial vitality in the Fourth Circuit, but their effectiveness for this purpose has been attenuated by the requirement that transfers be freely given. *Jeffers* v. *Whitley*, 309 F. 2d 621 (4th Cir. 1962). The question in *Jeffers* was whether a system of racial assignments could cure the constitutional infirmity of a biracial school system. The Court found that this could not be so if the system were not completely voluntary. The Court said:

> [I]f a voluntary system is to justify its name, it must, at reasonable intervals, offer to the pupils reasonable alternatives, so that, generally, those who wish to do so may attend a school with members of the other race. 309 F. 2d at 627.

In other words, transfers must be "had for the asking" (309 F. 2d at 628). The *Jeffers* solution still left the administrative burden on the individual school child to apply to the School Board for that to which he was entitled as of right. However, the Court threw doubt on this vestige of the pupil placement law by saying:

> There can be no freedom of choice if its [the transfer request's] exercise is conditioned upon exhaustion of administrative remedies which, as administered, are unnegotiable obstacle courses. 309 F. 2d at 628.

Pending before the Fourth Circuit is the issue of whether the administrative burden may continue to be placed on each individual school child to level the biracial school structure. See *Farmer* v. *Greene County Board of Education*, 4th Cir., No. 9125, now being reconsidered *en banc*.

[10] *Northcross* v. *Board of Education of the City of Memphis*, 302 F. 2d 818 (6th Cir. 1962).

School Board argued that the transfer provisions created a voluntary system and that therefore, there was no compulsory segregation of the races. The Court of Appeals dismissed this and similar contentions saying (302 F. 2d at 823):

> Minimal requirements for non-racial schools are geographic zoning according to the capacity and facilities of the buildings and admission to a school according to residence as a matter of right. "Obviously the maintenance of a dual system of attendance areas based on race offends the constitutional rights of the plaintiffs and others similarly situated and cannot be tolerated." *Jones* v. *School Board of City of Alexandria, Virginia*, 278 F. 2d 72, 76, C. A. 4.

That Court concluded (302 F. 2d at 823):

> Negro children cannot be required to apply for that to which they are entitled as a matter of right.

The reasons assigned for holding the transfer provisions an insufficient vehicle for reorganizing the schools on a nonracial basis were essentially practical. The reasons stemmed from an appreciation of the hard fact that shifting the administrative burden of desegregation to each individual school child ineluctably results in token desegregation.

The Court found (302 F. 2d at 823):

> Any pupil through both parents may request a transfer, but in the final analysis it is up to the School Board to grant or reject it. Although an appeal may be taken into the courts it would be an expensive and long drawn out procedure with little freedom of action on the part of the courts. In determining requests for transfers the Board may apply the criteria heretofore

> mentioned. None of these criteria is based on race, but in the application of them, one or more could always be found which could be applied to a Negro. The denial of the transfers herein referred to is significant of the practical application of the transfer provisions of the law.

In short, *Northcross* persuasively demonstrates that the responsibility for initiating and effectuating desegregation rests upon the school authorities and that these authorities cannot shift their responsibilities to others. Especially is that true when that shifting of responsibility operates to inhibit desegregation.

The short of petitioner's submission is that the Atlanta plan is ineffective to transform the biracial system into a unitary nonracial system in accordance with the decisions of this Court. The remedy is not to strike at the branches of the evil, but at its root. In this case, the root of the evil is the biracial school structure itself. That structure must be removed in favor of some reasonable nonracial system of pupil assignment.

2. *The Delay Countenanced by the Plan Is Unwarranted.*

Not only must a unitary system be established, but it must come with greater celerity than 12 years. Petitioner's plan for moderate acceleration to 6 years (1960-1965) (R. 82-83) should have been approved by the court below. If this had been done, desegregation would today be on the verge of completion.

Petitioners submit that this Court's recent admonition in *Watson* v. *City of Memphis*, 373 U. S. 526, not only authorized but compelled such acceleration. Mr. Justice Goldberg speaking for the Court in *Watson* said:

> [T]he second Brown decision, 349 U. S. 294, 75 S. Ct. 753, which contemplated the possible need of some limited delay in effecting total desegregation of public schools, must be considered . . . in light of the significant fact that the governing constitutional principles no longer bear the imprint of newly enunciated doctrine. . . . [W]e cannot ignore the passage of a substantial period of time since the original declaration of the manifest unconstitutionality of racial practices such as are here challenged, the repeated and numerous decisions giving notice of such illegality, and the many intervening opportunities heretofore available to attain the equality of treatment which the Fourteenth Amendment commands the States to achieve. These factors must inevitably and substantially temper the present import of such broad policy considerations as may have underlain, even in part, the form of decree ultimately framed in the Brown case. Given the extended time which has elapsed, it is far from clear that the mandate of the second Brown decision requiring that desegregation proceed with "all deliberate speed" would today be fully satisfied by types of plans or programs for desegregation of public educational facilities which eight years ago might have been deemed sufficient. Brown never contemplated that the concept of "deliberate speed" would countenance indefinite delay in elimination of racial barriers in schools . . . 373 U. S. at 529-30.

That standards for desegregation plans adequate in 1955 are no longer adequate—and that it is time for a second look at the rate of desegregation—was reemphasized by Mr. Justice Clark in *Goss* v. *Board of Education of the City of Knoxville*, 373 U. S. 683, 689:

> Now however, eight years after this decree [*Brown II*] was rendered, and over nine years after the first Brown decision, the context in which we must interpret and apply this language to plans for desegregation has been significantly altered.

The Courts of Appeals have also shown great impatience with the all-too-deliberate-sloth of the 12-year plans. Four circuits—the Third,[11] Fourth,[12] Fifth[13] and Sixth[14]—have now invalidated "grade-a-year" plans.

"These decisions make perfectly plain that the burden was on respondents here to show that the delay attendant upon the "grade-a-year" feature of the plan was imperatively and compellingly unavoidable. No such showing was made.

Moreover, these decisions dictate that respondents should not now be treated as those school boards which made a prompt and reasonable start in 1955.

3. *A Prompt and Reasonable Start Should Be Made Toward Desegregation of the School Personnel.*

Another major prop of the segregated school system which the majority opinion leaves standing is the segregated staff. As all the world knows, in Atlanta, as elsewhere, school segregation not only consists of having a Negro child in every seat in a Negro school but in having a Negro teacher in front of every Negro class. Moreover,

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[11] *Evans* v. *Ennis*, 281 F. 2d 385 (3d Cir. 1960).

[12] *Jackson* v. *School Board of The City of Lynchburg*, 321 F. 2d 230 (4th Cir. 1963).

[13] *Bush* v. *Orleans Parish School Board*, 308 F. 2d 491, 500, 501-502 (5th Cir. 1962).

[14] *Goss* v. *Board of Education of the City of Knoxville*, 304 F. 2d 164 (6th Cir. 1962), reversed on other grounds, 373 U. S. 683.

Atlanta goes so far as to put all Negro schools under the direction of a Negro supervisor (R. 72).

The District Court, in this case, indefinitely postponed consideration of the assignment of Negro teachers on a nonracial basis. Such deferment is *per se* contrary to this Court's admonitions in *Watson* and *Goss* that the time has come for full compliance with this Court's directive to put an end to jerry-built devices for preserving segregation.

And recently the Court of Appeals for the Fifth Circuit decreed that the practice of assigning teachers by race falls within the *Brown* proscription against the continuation of racial distinctions in the public school system. *Board of Public Instruction of Duval County* v. *Braxton*, 5th Cir., No. 20294, January 10, 1964.

4. *Unreversed, the Majority Opinion Dictates That Soon Another Generation of Negro Students Will Graduate From Atlanta's Public School System With the Promise of Equality Made in 1954 Unredeemed.*

The majority opinion's approval of Atlanta's policy of tokenism and delay cannot be squared with the proposition that the constitutional right to attend a desegregated public school system is a *present* right. This court recently said in *Watson*:

> [T]he delay countenanced by *Brown* was a necessary albeit significant adaptation of the usual principle that any deprivation of constitutional rights calls for prompt rectification. The rights here asserted are, like all such rights, *present* rights; they are not merely hopes to some *future* enjoyment of some formalistic constitutional promise. The basic guarantees of our Constitution are warrants for the here and now, and, unless there is an overwhelmingly compelling reason, they are to be promptly fulfilled. 373 U. S. at 532-33.

The result of the majority opinion is not only inconsistent with the great promise of equality envisioned by this Court's 1954 decision, but it also jeopardizes the forward progress made to date. Three other major school districts —Savannah, Georgia, Birmingham, Alabama, and Mobile County, Alabama—ordered to commence desegregation in September, 1962, by the Fifth Circuit, pending appeal, immediately adopted the Atlanta plan which had just been approved. As a result, Savannah admitted 21 Negro students to the 12th grade out of a school population of 24,013 whites and 15,336 Negroes. Birmingham admitted 5 to the 12th grade out of a school population of 37,500 whites and 34,834 Negroes. Mobile County admitted 2 to the 12th grade out of a school population of 47,247 whites and 30,020 Negroes.

Unreversed, the majority opinion supports the proposition that token desegregation conforms to the mandate of equal protection of the laws. This erroneous and mischievous doctrine requires prompt expunction by this Court.[15]

[15] See Bickel, *The Decade of School Desegregation*, 64 Columbia Law Review 193 (1964), particularly pp. 208-211.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the judgment below should be reversed.

Respectfully submitted,

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